

INSIDE THIS ISSUE:

THE PORTABLE E-BOOK REVOLUTION, PART 1	1. 5
AIME ATTORNEY ANSWERS YOUR QUESTIONS	6. 7
AIME DUES INCREASE	8

**THE PORTABLE E-BOOK
REVOLUTION, PART I:
THE INDIVIDUAL USER**

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If you are a traditionalist and want to read the latest biography of Winston Churchill, you can simply go to your neighborhood bookstore, visit your public library, order a copy online for UPS delivery, or borrow the book from a friend. In each case, you'll have the hard copy in your hands, you can leaf through the pages and, if it is your copy, make notes in the margin. However, if you're thinking of succumbing to the latest digital craze, you may want the e-book version of the biography. While the hardbound book might cost \$30, the e-book may be half, or even a third the price. That's an attractive savings. If you are a librarian looking to stock your collection, the savings can be too substantial to ignore.



With the enhanced marketing of portable e-book devices, such as Amazon's Kindle, Apple's iPad and Barnes & Noble's Nook, millions of these devices are in the hands of the public. People are eager to access the vast and growing body of e-literature. However, with e-books' promise comes e-books' confusion. Unlike its hardback brethren, e-books are loaded with digital strings, allowed by technology and enforced by copyright law. To give you a better understanding of what this will mean to the average reader, here's an overview of the legal issues for individual users lurking within The Portable e-Book Revolution.

First, the DMCA. As with all things digital over the last decade, we need to start with the Digital Millennium Copyright Act of 1998 ("DMCA"). The DMCA was the result of the debate that raged in the 1990s as the Internet grew from its esoteric government and academic roots to a commercial medium for all communications. Publishers were particularly concerned about the ease of transmitting digital files via the Internet and wanted a way to control how their works are exploited. So the heart of the DMCA, an entire chapter within the Copyright Act, is the

**LEGAL POINTS
OF INTEREST**

- The DMCA
- Contract Law and the Copyright Act
- First Sale Doctrine
- The Device
- E-Book License
- E-Book Store
- Libraries?

rule that if the copyright owner distributes a work with technological measures that control access to that work, those measures cannot be circumvented; they must be respected. To support that rule are requirements and penalties – both civil and criminal – that insist once a work covered by the DMCA is acquired, these standards must be respected. With this law in place, publishers believed they had the legal framework with which to begin making digital works widely available to the public.

Second, contract law and the Copyright Act. A principle at the heart of copyright law – respect for contracts – is also pivotal for the legal assessment of e-books. Every student of copyright needs to understand that regardless what privileges and exemptions are enunciated in the statute, by agreement author and user can modify the terms of use. In particular, the provisions of copyright law that set forth the limitations on the rights of owners, including fair use (Section 107) and educational exemptions such as library photocopying (Section 108) and performances in face-to-face teaching environments (Section 110[1]) can be contracted away. Courts will enforce agreements or licenses between parties, even if the end result is that the user has fewer protections and the copyright owner more rights than stipulated in law. It is no accident that when one acquires an e-book, there is a license agreement that sets conditions the use of the work. More about particular licenses momentarily, but for now, it is vital to understand that if there is a contract or license that facilitates the acquisition of the work, the terms of that agreement can trump copyright law.

Third, the First Sale Doctrine. Among the most time honored elements of copyright law is Section 109(a), the First Sale Doctrine. This provision states simply that the owner of a copy of a work is entitled, without further permission from the copyright owner, to sell, lend or otherwise dispose of that copy. This provision is at the heart of our library system – a library buys a copy of a book, and that book can be loaned out repeatedly without clearance by the copyright owner. Similarly, you can lend or give your copy of any book, movie, and CD, photograph, provided you own that copy. In the case of e-books, however, ownership of the digital copy is never conveyed. Even though the recipient of an e-book can hold onto the work forever, by contract that user is a licensee of the copy, not an owner. The license means that the recipient of the e-book version has fewer rights to exploit the work than compared to the hardbound version, because the acquisition is regulated by the agreement, not law. By this simple but significant shift, the e-book revolution has crossed a divide – it has taken the First Sale Doctrine out of play and placed the copyright owner in control.

Fourth, the Device. To state the obvious, to get an e-book, you must have a digital device. Which one to choose? There are important distinctions between the various options. There are cer-



Respect for contracts is a pivotal principle for the legal assessment of e-books.

tain physical characteristics that make one device preferable to another. These can include size, whether the text is in color or black-and-white, battery life, ease of portability, and whether the format allows you to make note on the e-copy. You can make up your mind about any of these factors, but perhaps the single most significant issue is one a consumer may overlook, but which has ramifications over the life of the device: what can be done with the downloaded work? Can you share the work with family or friends once you finished reading it? If you manage a library, can you loan the e-book out to patrons?

Fifth, the e-Book License. Answers to most of these basic questions lie in the contract that you agree to when the device and e-books are acquired. While many purchasers pay no attention to these terms, the manufacturers of the devices and the publishers whose works are made available for the device carefully consider these license provisions. By incorporating technological measures – digital rights management (DRM) code in the digital file of the e-book – they can ensure that the work is handled as they determine. Any effort to alter the DRM files can run afoul of the DMCA, replete with its penalties.

So what do the providers of the devices say to users? Here's one example, a portion of the license terms for the Amazon Kindle:

Use of Digital Content. Upon your payment of the applicable fees set by Amazon, Amazon grants you the non-exclusive right to keep a permanent copy of the applicable Digital Content and to view, use, and display such Digital Content an unlimited number of times, solely on the Device or as authorized by Amazon as part of the Service and solely for your personal, non-commercial use. Digital Content will be deemed licensed to you by Amazon under this Agreement unless otherwise expressly provided by Amazon.

Restrictions. Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense or otherwise assign any rights to the Digital Content or any portion of it to any third party, and you may not remove any proprietary notices or labels on the Digital Content. In addition, you may not, and you will not encourage, assist or authorize any other person to, bypass, modify, defeat or circumvent security features that protect the Digital Content.

In short, Amazon, not the user, controls where and how the e-book will be displayed.

Similarly, Apple's iPad works off of iPad Software, which is restricted to Apple devices, and only one iPad at a time. Here is the contractual provision relating to constraint on transferring the iPad software:



Manufacturers of the devices and the publishers whose works are made available for the device carefully consider license provisions.

3. Transfer. You may not rent, lease, lend, sell, redistribute, or sublicense the iPad Software. You may, however, make a one-time permanent transfer of all of your license rights to the iPad Software to another party in connection with the transfer of ownership of your iPad, provided that: (a) the transfer must include your iPad and all of the iPad Software, including all its component parts, original media, printed materials and this License; (b) you do not retain any copies of the iPad Software, full or partial, including copies stored on a computer or other storage device; and (c) the party receiving the iPad Software reads and agrees to accept the terms and conditions of this License.



So the right to use iPad Software is personal to the owner of the iPad. It allows for one time transfer of the device, but not to share the device. How Apple proposes to enforce that restriction is not evident; however, if it identifies abuses with its technology, it has a contractual hook by which to impose its rules.

Sixth, the E-Book Store. With the device in hand, one now turns to the actual purchase of e-books. For starters, you must make sure your device can display the book you acquire. Amazon, for example, has its own proprietary format for e-books delivered to its customers. While Amazon promises you can download the text in 60 seconds, if the device cannot read the format, you'll get gibberish. Amazon has applications that allow its e-books to be read by iPhones, iPads and BlackBerries. With an Internet connection, one can freely move the e-book between devices authorized by Amazon. However, without the application, the e-book cannot be displayed or moved. So, in a competitive world, Amazon can prevent Kindle e-books from being displayed on B&N's Nooks, and vice versa. Whether the e-book industry will develop a common language and technical compatibility to enable downloads to be displayed on all devices remains to be seen. As with the Beta-VHS tape wars of the 1980s, one format may hope for supremacy, or the industry may accept the many varied competitors and look to allow interoperability of the e-books and devices. For the moment, DRM limits interchanging e-books and devices unless expressly approved by the source.

Aside from format issues, there is the large question of the First Sale Doctrine – the very notion of lending a copy of the e-book. Since the e-book is a digital copy, the DRM within the e-book controls how others can access it. In some cases, as now offered by Barnes & Noble, there is a 14 day window within which a user can actually transfer the e-book from one Nook to another. This digital sharing is accomplished by physical deletion of the e-book from Nook #1, when it appears on Nook #2. In two weeks – poof! It

Some companies have their own proprietary formats, so make sure your device can display the book you acquire.

transfers back to Nook #1. By contrast, Amazon e-books doesn't allow transfers between Kindle devices. That means that if you want to share your e-book copy of *Content Rights* by Arnold Lutzker, you must physically loan your Kindle to your best buddy.

Another interesting drama has already stung some Kindle owners. It turns out that Amazon had a dispute with the copyright owners of George Orwell's *1984*. Mistakenly believing the work to be in the public domain, Amazon was selling e-copies of the book; however, *1984*'s publisher challenged the action, forcing Amazon's hand. As a result, in a 60 second switcheroo, Amazon went in and deleted the e-copies already on many users' Kindles. The capacity of Amazon to retrieve works remotely is an inherent feature of the DRM contained in each work. Obviously, this is something that never could happen with hardbound books. The dispute was further complicated by the legal question whether Amazon had the right to delete e-books once sold, even if it had the technological capacity to do so. Did the Amazon agreement cover such an occurrence? Look for modified licenses to make the point explicit. However, as a way of making peace with its customers, Amazon agreed not to repeat the action, absent a court order. Still, that leaves the status of the permanency of e-books on one's devices up in the air.

Other issues can proliferate. For example, authors and their publishers are sensitive to the list price of e-books and their share. When Amazon started Kindle's store, it set prices of e-books at \$9.99. Then Apple's iPad hit the market, and it began offering e-books at \$12.99. The publishers (naturally) preferred the higher prices. Amazon and Macmillan reached an impasse that resulted in Amazon e-bookstore halting sales of Macmillan titles for Kindles. The dispute was resolved with a price change. In short, by virtue of control over digital content, publishers can dictate which e-store has access to which works at what price. That is the e-book equivalent of the *Star Wars* video of the 1980s being available only in VHS-format and not Beta. A word of caution to publishers: price controls raise the antennae of federal and state regulators, where anti-trust laws prohibit price collusion.

Seventh, what about libraries? As to libraries, public and private, the e-book revolution raises still more questions. The ramifications for educators are important and subtle and worth a longer treatment. I will deal with that in the next AIME newsletter, as we cover Part II of *The Portable e-Book Revolution: The Institutional User*.

Until then, as always, stay tuned.

Arnold Lutzker serves as legal counsel for AIME.



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